

No. 15385

United States
Court of Appeals
for the Ninth Circuit

DICK LEE EVANS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

FEB - 8 1957

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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PROLOGUE TO A VOTE

BY JAMES B. GILDED

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

J. B. TIETZ,
257 South Spring Street,
Los Angeles 12, California.

For Appellee:

LAUGHLIN E. WATERS,
U. S. Attorney;

LOUIS LEE ABBOTT,
Asst. U.S. Attorney, Chief, Criminal Di-
vision;

JOHN K. DUNCAN,
Asst. U. S. Attorney,
600 Federal Building,
Los Angeles 12, California.

United States District Court for the Southern
District of California, Central Division
No. 24959-CD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DICK LEE EVANS,

Defendant.

INDICTMENT

[U.S.C., Title 50, App., Sec. 462-Universal Military Training and Service Act.]

The grand jury charges:

Defendant Dick Lee Evans, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 115, said board being then and there duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on December 6, 1955, in Los Angeles County, California, in the division and district aforesaid; and at said

time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly [2*] failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do.

A True Bill,

/s/ GEORGE DIETZLER,
Foreman.

/s/ LAUGHLIN E. WATERS,
United States Attorney.

[Endorsed]: Filed April 25, 1956. [3]

[Title of District Court and Cause.]

STIPULATION RE SELECTIVE
SERVICE FILE

It Is Hereby Stipulated and Agreed by and between the United States of America, plaintiff, and Dick Lee Evans, defendant, in the above-entitled matter, as follows:

That it be deemed that Edith P. Kunz was called, sworn and testified as follows:

1. She is a Clerk employed by Local Board No. 115; Selective Service System, United States Government.
2. The defendant, Dick Lee Evans, is a registrant of said Local Board No. 115.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

3. As Clerk of said Local Board No. 115, is legal custodian of the original Selective Service file of defendant.

4. The Selective Service file of defendant, Dick Lee Evans, is an official record kept in the regular course of business by said Local Board No. 115, and it is the [4] regular course of said Local Board No. 115's business to make such a record at the time of each act, transaction, occurrence or event noted in the said Selective Service file, or within a reasonable time thereafter.

It Is Further Stipulated that the photostatic copy of the said original Selective Service file of Dick Lee Evans, marked "Government's Exhibit 1" for identification, is a true and accurate copy of the said original Selective Service file of defendant.

It Is Further Stipulated that the photostatic copy of the said original Selective Service file of defendant, Dick Lee Evans, marked "Government's Exhibit 1" for identification, may be introduced in evidence in lieu of the said original Selective Service file.

Dated: July 23, 1956.

LAUGHLIN E. WATERS,
United States Attorney;

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division;

/s/ JOHN K. DUNCAN,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

/s/ J. B. TIETZ,
Attorney for Defendant.

/s/ DICK LEE EVANS,
Defendant.

It Is So Ordered: This 23rd day of July.

/s/ THURMOND CLARKE,
United States District Judge.

JKD:cr

[Endorsed]: Filed July 23, 1956. [5]

[Title of District Court and Cause.]

**MOTION FOR JUDGMENT
OF ACQUITTAL**

May It Please the Court:

Now comes the defendant and moves the Court for a judgment of acquittal for each and every one of the following reasons:

1. There is no evidence to show that the defendant is guilty as charged in the indictment.
2. The Government has wholly failed to prove a violation of the Act and Regulations by the defendant as charged in the indictment.
3. The denial of the conscientious objector status by the Selective Service System and the recommendation by the Hearing Officer to the Department of Justice and by the Department of Justice to the board of appeals were each without

basis in fact, arbitrary, capricious and contrary to law.

4. The report of the Hearing Officer, relied upon by the Department of Justice and the board of appeals, is arbitrary, capricious and illegal because it refers to artificial, fictitious and [6] unlawful standards not authorized by the Act and Regulations and advises the appeal board to classify according to irrelevant and immaterial lines in determining that the defendant was not a conscientious objector when a pursuit of the Act and Regulations was the only thing for the Hearing Officer and the appeal board to follow.

Respectfully submitted,

/s/ J. B. TIETZ,

Attorney for Defendant.

July 24, 1956.

[Endorsed]: Filed July 23, 1956. [7]

United States District Court for the Southern
District of California, Central Division
No. 2459-Criminal (CD)

UNITED STATES OF AMERICA,

vs.

DICK LEE EVANS.

JUDGMENT AND COMMITMENT

On this 6th day of August, 1956, came the attorney for the government and the defendant appeared in person and J. B. Tietz, his Attorney.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty, and a finding of Guilty of the offense of knowingly fail and neglect to be inducted into the Armed Forces of the United States as so ordered and notified to do under the Universal Military Training and Service Act, in violation of Title 50, App., U. S. C., Sec. 462, as charged in the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three Months.

Bond of the defendant is ordered exonerated.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

[Seal] /s/ THURMOND CLARKE,
United States District Judge.

[Endorsed]: Filed August 6, 1956. [8]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant, Dick Lee Evans, resides at 2711 E. 111th Street, Lynnwood, California.

Appellant's attorney, J. B. Tietz, maintains his office at 410 Douglas Building, 257 South Spring Street, Los Angeles 12, California.

The offense was failing to submit to induction, U. S. C., Title 50 App., Sec. 462—Selective Service Act, 1948, as amended.

On August 6, 1956, after a verdict of Guilty, the Court sentenced the appellant to three months, confinement in an institution to be selected by the Attorney General.

I, J. B. Tietz, appellant's attorney, being authorized by him to perfect an appeal, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

/s/ **J. B. TIETZ,**
Attorney for Appellant.

[Endorsed]: Filed August 6, 1956. [10]

[Title of District Court and Cause.]

EXTENSION OF TIME
(With Stipulation)

For good cause shown, defendant is hereby given 45 additional days, to and including October 26, 1956, to prepare and docket the record on appeal.

Dated: September 4, 1956.

/s/ **THURMOND CLARKE,**
Judge.

The appellee stipulates to the above-requested extension of time.

LAUGHLIN E. WATERS,
United States Attorney;

By /s/ **JOHN K. DUNCAN,**
Assistant U. S. Attorney.

[Endorsed]: Filed September 4, 1956. [13]

In the United States District Court, Southern
District of California, Central Division

No. 24759-Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DICK LEE EVANS,

Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Monday, July 23, 1956

Appearances:

For the Plaintiff:

LAUGHLIN E. WATERS,
United States Attorney; by
JOHN DUNCAN,
Assistant United States Attorney.

For the Defendant:

J. B. TIETZ,
410 Douglas Building,
South Spring and Third Streets,
Los Angeles 12, California.

Honorable Thurmond Clarke, Judge Presiding.

Monday, July 23, 1956—3:40 P.M.

The Court: United States versus Evans.
Go ahead. I have the file.

Mr. Duncan: May the record show that the defendant, Dick Lee Evans, and his attorney are present in court, your Honor?

The Court: Yes.

I have the file, and I have the trial brief.

Mr. Duncan: The Government at this time, your Honor, will present a stipulation which admits Government's Exhibit for Identification No. 1 into evidence.

The Court: All right.

(The document heretofore marked Plaintiff's Exhibit 1 was received in evidence.)

Mr. Duncan: The Government rests.

The Court: The Government rests.

Mr. Tietz: The defendant has filed a motion for a judgment of acquittal.

I would like to be heard very briefly at this time, although I think it would be preferable to leave the real argument to the end of the case so that there might be one argument on the merits.

The Court: All right.

Mr. Tietz: The United States Attorney has put his [3*] finger, in his brief, on a threshold point that is of crucial importance to this case and one that, in this form, has never before arisen, in my opinion. I have participated in practically all of the cases that have had this point in them in the Circuit, and they have all been different than what we have here. If the Court decides against the de-

^{*}Page numbering appearing at top of page of original Reporter's Transcript of Record.

fendant on this point, as the United States Attorney urges, then of course he won't be able—he won't be in position to present his other defenses. In other words, he has forfeited the right, by the failure to take an administrative appeal from the second 1A classification.

On the other hand, it is a point of first impression. All the cases I cited and all the other cases on the subject, and there are quite a few, are instances where an individual, as this particular defendant, didn't take an administrative appeal or didn't report at the induction station for the induction ceremony. In some cases, like in the Williams case, cited by the United States Attorney, Williams didn't do either but he was out on both grounds.

This particular defendant stands in a quite different position, in my opinion, before this Court, in that he did take an appeal from the 1A classification, and then in 1954 when his classification was reopened to put him back in the same classification he took no appeal because it would have been a futile thing. [4]

I therefore submit to the Court, and I would like to argue it briefly or at as much length as the Court may wish, that he has exhausted his administrative remedies.

(Whereupon, oral argument was had, which argument was reported but is not here included, by request of Mr. Tietz.)

The Court: I will deny the motion at this time.

Do you want to put on some testimony? Then I will hear from you at a later date.

Mr. Tietz: Yes.

The Court: I will take the testimony while you are here, and then hear your argument next Monday or sometime, because we have such a big calendar.

Mr. Duncan: I believe the question Mr. Tietz has put to the Court is that there might be no necessity for taking testimony. Mr. Tietz has readily admitted that the point he has raised is a unique point; that there was no reason for this defendant to appeal——

The Court: I thought while he is here, let's take the testimony and then pick up the argument next Monday. You know the calendar we have today and tomorrow.

Mr. Duncan: If your Honor would rule on this point, it might be that no testimony would be required. I think that is the point Mr. Tietz is seeking to make by asking your Honor to rule on the point he has raised. [5]

The Court: Well, I have just denied the motion for acquittal at this time. Then you said you wanted to put on some testimony now.

Mr. Tietz: Yes.

The Court: You want to argue the point at length later on, you said.

Mr. Tietz: That is one way of going about it. The testimony is very short.

The Court: We can take the testimony and then hear the argument later on.

Mr. Duncan: Your Honor, I will object to any testimony that is offered, on the basis that it would be irrelevant. Since this defendant did not exhaust his administrative remedies, there is truly nothing before this Court. This man hasn't gone to the Selective Service system to determine what his classification should be.

The Court: I know, you raise that point. But let's take the testimony and then argue the matter later on. That is my thought. We got started late. We have jury trials tomorrow. We have had a terrific calendar today. I thought I would take the testimony and have you write a brief on the subject. I have to go ahead with these trials tomorrow. We have had a terrific day today.

Mr. Duncan: My point is that no testimony is properly offered at this stage of the trial. [6]

The Court: Why not take the testimony subject to a motion to strike on your part later on?

Mr. Duncan: As I say, I will object to any question that Mr. Tietz puts to his client.

The Court: You say your testimony is going to be brief?

Mr. Tietz: Yes.

The Court: We can put the testimony on and overrule the objection subject to a motion to strike, and get that behind us.

Mr. Tietz: It should take only a few minutes, your Honor, unless Mr. Duncan has lengthy cross-examination.

The Court: Let's put him on. That is my thought. There was a misunderstanding as to the time of starting this case.

DICK LEE EVANS

being the defendant herein, called as a witness in his own behalf, being first duly sworn, on his oath was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Dick Lee Evans.

Direct Examination

By Mr. Tietz:

Q. I am going to direct your attention to the occasion you had a hearing before a Hearing Officer of the Department [7] of Justice here in Los Angeles. Do you remember that? A. Yes.

Q. Briefly, what did you and the Hearing officer discuss?

Mr. Duncan: I object, your Honor. That question is irrelevant. There is no issue. This Court is not to attempt to classify this defendant. The only thing before this Court at the present time is whether or not it has any jurisdiction. This defendant didn't exhaust his administrative remedies. The only thing for this Court to determine is his intent in violating the law.

The Court: I am going to overrule the objection and hear the testimony, subject to a motion to strike later on. You have stated your point.

Q. (By Mr. Tietz): Do you remember this? The Court will permit you to answer it.

A. Will you repeat that, please?

Q. You had a conversation with a Hearing Of-

(Testimony of Dick Lee Evans.)

ficer of the Department of Justice in his office, did you not? A. Yes.

Q. Briefly, give us the gist of that conversation.

A. Well, we had a few words back and forth about why I didn't believe in fighting for the country and why I would protect my family at home, whereas I wouldn't go out and get in carnal warfare with another country; and he seemed [8] to think if I would protect my home and family, that also I should protect my country and fight in the governmental war. That is about what he seemed to base his whole conversation on.

Mr. Duncan: I move to strike the answer, your Honor.

The Court: I am going to take the motion to strike later on, after all his testimony is completed, and then take it under submission.

Q. (By Mr. Tietz): Was much time spent by you and the Hearing Officer on any other topic?

A. No, he kept bringing that subject up, and when I would bring up anything else to state my faith he would come back with this same statement. That is all he seemed to think that mattered.

Q. Now I am going to direct your attention to a hearing you had before your Local Board. Do you remember that occasion? A. Yes.

Q. Can you tell us the gist of the discussion that you had with the members of the Local Board at that hearing?

A. Well, they asked me what kind of work I

(Testimony of Dick Lee Evans.)

did, and I was going through that. They said, "Did it have anything to do with any kind of governmental work?"

I said, "Once in a while we might do something. I [9] was a truckdriver at the time, and we might have hauled something that was government property."

So they thought if I would do that, why wouldn't I go to war and do the same thing? And they brought up that same statement of protecting my country and why wouldn't I do that if I would protect my home and family?

Q. Did they ask you about use of firearms or hunting?

A. Yes, they asked me if I had any. I told them I did. They asked me what I used them for. I said I used them for meat in the season, and I didn't do hunting as a sport.

Q. Did they indicate what weight they were giving these particular items in their decisions?

A. Well, me owning a firearm, I guess they thought maybe that would be a reason why, if I would go out shooting a gun for uses like that, that I would be able to go to war and do the same thing. And they thought if I wouldn't protect my country, would I protect my home and family with that same country?

Q. You say "they thought." Did they say something that was directly to that point, or is that something you think they thought?

(Testimony of Dick Lee Evans.)

A. Well, that is what they kept bringing up, that same question.

Mr. Tietz: I see.

You may cross-examine. [10]

The Court: Any questions, Mr. Duncan?

Mr. Duncan: I would move at this time again to strike all of the testimony of the defendant, under the Estep case. This Court is not called upon to classify this defendant. The only thing before this Court—and I do not as yet admit that this is before the Court: Was there any basis in fact for the classification granted by the Selective Service system? I submit that issue is not yet before the Court.

The Court: I will deny the motion to strike, and take the motion under submission. I am not going to rule on the matter right now.

Mr. Tietz: Will the Court hear me on the motion?

The Court: I don't know whether he is going to cross-examine.

Mr. Duncan: May I ask one question?

Cross-Examination

By Mr. Duncan:

Q. You stated, Mr. Evans, that they kept bringing it up with reference to firearms before the Local Board. What do you mean by that?

A. Well, I owned a gun, and they thought—I don't know whether they thought—they kept saying, would I use it in the wars, and I told them no, I didn't have it for that purpose. [11]

(Testimony of Dick Lee Evans.)

Q. What did you tell them you had it for?

A. I told them I used it for hunting; especially deer season, I used to go deer hunting.

Mr. Duncan: I have no further questions.

The Court: That is all. Step down.

That is all the testimony, isn't it, Mr. Tietz?

Mr. Tietz: Yes, your Honor.

The Court: I will continue the matter for further proceedings until next Monday at 2:30 p.m.

Mr. Tietz: Will your Honor hear argument at that time?

The Court: Yes. I will hear the argument at 2:30 p.m., on next Monday. We got started so late on this matter. There was a misunderstanding. We will hear the argument at 2:30 on next Monday afternoon, July 30th. [12]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on Monday, July 23, 1956, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 19th day of October, 1956.

/s/ JOHN SWADER,
Official Reporter.

[Endorsed]: Filed December 4, 1956. [13]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 16, inclusive, containing the original:

Indictment;

Stipulation re Selective Service File;

Motion for Judgment of Acquittal;

Judgment & Commitment;

Application for Bail Pending Appeal;

Notice of Appeal;

Order Permitting Defendant to Leave This Jurisdiction;

Extension of Time (With Stipulation);

Designation of Record;

Extension of Time.

B. I. volume reporter's transcript of proceedings had on July 23, 1956, and Plaintiff's Exhibit No. 1.

I further certify that my fee for preparing the foregoing record amounting to \$1.60, has been paid by appellant.

Witness my hand and seal of the said District Court, this 7th day of December, 1956.

[Seal]

JOHN A. CHILDRESS,
Clerk.

By /s/ CHARLES E. JONES,
Deputy Clerk.

[Endorsed]: No. 15385. United States Court of Appeals for the Ninth Circuit. Dick Lee Evans, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: December 8, 1956.

Docketed: December 13, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15385

DICK LEE EVANS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant will rely upon the following points in the prosecution of his appeal from the judgment entered in the above-entitled cause.

I.

The trial court erred in that it misapplied the rule requiring a selective service registrant to exhaust his administrative remedies before he can present his defenses to a court.

II.

The trial court erred in not holding that the denial of the conscientious objector status by the Selective Service System and the recommendation by the Hearing Officer to the Department of Justice and by the Department of Justice to the Board of Appeals were each without basis in fact, arbitrary, capricious and contrary to law.

III.

The trial court erred in not holding that the report of the Hearing Officer, relied upon by the Department of Justice and the Board of Appeals, is arbitrary, capricious and illegal because it refers to artificial, fictitious and unlawful standards not authorized by the Act and Regulations and advises the Board of Appeals to classify according to irrelevant and immaterial lines in determining that the defendant was not a conscientious objector when a pursuit of the Act and Regulations was the only thing for the Hearing Officer and the Board of Appeals to follow.

/s/ J. B. TIETZ.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 15, 1956.